



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 23, 1998

Ms. Linda Wiegman  
Supervising Attorney  
Office of General Counsel  
Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756-3199

OR98-0509

Dear Ms. Weigman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112782.

The Texas Department of Health (the "department") received a request for information regarding John Peter Smith Hospital and American Transitional Hospital. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with various statutes, common-law and constitutional privacy, and the informer's privilege. We have considered the exception you claim and reviewed the submitted information.

Sections 552.301 and 552.302 require a governmental body to release requested information or to request a decision from the attorney general within ten business days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision within ten business days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

The department received the request for information on September 18, 1997. You requested a decision from this office on December 2, 1997. Consequently, you failed to request a decision within the ten business days required by section 552.301(a) of the Government Code. Thus, as you assert that the requested information is made confidential by other laws, we will examine whether the documents at issue are public and must be disclosed.<sup>1</sup>

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 of the Government Code encompasses common-law and constitutional privacy. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has determined that common-law privacy protects certain financial information, including information about personal financial decisions. *See* Open Records Decision No. 600 (1992) at 9-12. In the instant case, we believe that the identities of the patients constitute private information. Therefore, the department must redact all patient identifying information, including names, street addresses, telephone numbers, social security numbers, names of family members, names of employers, and individual and group policy numbers.<sup>2</sup> We have marked the information which must be withheld based on the constitutional or common-law right to privacy.<sup>3</sup>

Section 552.101 also encompasses information made confidential by statute. Section 48.101 of the Human Resources Code reads in pertinent part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

---

<sup>1</sup>A claim under the informer's privilege may be waived by the governmental body since the privilege belongs to the government. *See* Open Records Decision No. 549 (1990) at 6. We conclude that the informer's privilege is not a compelling exception in this instance and, therefore, may not be used to withhold any of the requested information from required public disclosure under section 552.101.

<sup>2</sup>Common-law privacy may also protect an individual's medical history, although it does not protect all medically related information. *See* Open Records Decision No. 478 (1987). Individual determinations are required. *See* Open Records Decision No. 370 (1983). However, in light of our conclusion in the instant case that the patients' identities must be withheld from disclosure, such individual determinations regarding medically related information is unnecessary.

<sup>3</sup>We note that common-law and constitutional privacy rights lapse upon the death of the subject. *See* Open Records Decision No. 272 (1981) at 1.

(1) a report of abuse, neglect, or exploitation made under this chapter;

(2) the identity of the person making the report; and

(3) except as provided by this section, all files, reports, records, communications and working papers used or developed in an investigation made under this chapter of in providing services as a result of an investigation.

The Seventy-fifth Legislature amended subsection (b) of section 48.101 to read as follows:

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101(b).<sup>4</sup> We have reviewed the responsive information the department submitted to this office. We believe that section 48.101(a) makes most of the information confidential. The department's rules do not permit the disclosure of the information to the requestor. 25 T.A.C. § 1.207. We have marked the information that the department must not release to the requestor. Gov't Code § 552.101.

In addition, section 261.201(a) of the Family Code reads in part as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under . . . chapter [261 of the Family Code] or in providing services as a result of an investigation.

We believe that some of the requested information consists of reports, records, and working papers used or developed in an investigation made under chapter 261 of the Family Code.<sup>5</sup>

---

<sup>4</sup>Act of May 31, 1997, S.B. 359, § 58, 75<sup>th</sup> Leg., R.S.

<sup>5</sup>We note that a parent of a victim of alleged child abuse or neglect may have a right to obtain from the Texas Department of Protective and Regulatory Services portions of the information concerning a report of alleged abuse or neglect. Fam. Code § 261.201 (g).

You have not informed this office of any rules the department has adopted that would permit access to the requested records. We, therefore, conclude that some of the requested records are confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 (1986) at 2 (construing predecessor statute). Accordingly, the department must not release the information which this office has marked to the requestor. Gov't Code § 552.101 (excepting from public disclosure information made confidential by statute).

You also claim that some of the records submitted in response to the request are confidential under the Medical Practice Act. Section 5.08 of the Medical Practice Act, V.T.C.S. article 4495b (the "MPA"), provides:

(a) Communications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient, is confidential and privileged and may not be disclosed except as provided in this section.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

In addition, section 5.08(j)(3) provides for further release of confidential medical records obtained with a valid consent for release only if the disclosure "is consistent with the authorized purposes for which consent to release the information was obtained." *See also* V.T.C.S. art. 4495b, § 5.08(c). Upon review of the submitted records, we find that none were *created or maintained by a physician*, and thus may not be withheld from disclosure under the MPA in conjunction with section 552.101 of the Government Code. We therefore conclude that the department may not release any of the submitted medical records based on section 552.101 of the Government Code.

Finally, we observe that a two-page document submitted for our review consists of statements of deficiencies and plans of correction for the medical facility which were prepared for purposes of a Medicare or Medicaid complaint investigation survey. You must, in accordance with federal regulations, release this document provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988). We assume that the provider has had a reasonable opportunity to review the report and to offer comments. Accordingly, you must release this report, but with deletions of information that identifies the persons specified in the regulations. *See* Open Records No. 138 (1976) at 3.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous

determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script, reading "Vickie Prehoditch".

Vickie Prehoditch  
Assistant Attorney General  
Open Records Division

VDP/ch

Ref.: ID# 112782

Enclosures: Marked documents

cc: Mr. Gary Tillery  
2105 StarDurst Court  
Euless, Texas 76040  
(w/o enclosures)